

Preserving the Viability of Specific Exceptions for Libraries and Archives in the Digital Age

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Libraries and archives play a critical role in the preservation of knowledge in the United States and throughout the world.¹ Their role encompasses not only the physical act of preserving materials and written works,² but also more broadly ensuring that our communities large and small can continually learn, research, and acquire knowledge in all of its forms.³ Indeed, with respect to the latter point,

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¹ Although we use the general term "libraries" throughout this essay, most of the issues discussed herein also apply to archives.

² The Society for American Archivists defines "preservation" to include "the act of keeping from harm, injury, decay, or destruction, especially through noninvasive treatment." Richard Pearce-Moses, *A Glossary of Archival and Records Terminology*, SOC'Y OF AM. ARCHIVISTS, 1, 304 (2005).

³ One particularly vivid and timely testament to the importance of libraries is the "secret library" maintained in the besieged Syrian city of Darayya at great risk to its proprietors

the role of libraries has only grown in the digital age. Now, the general public relies on libraries not only to check out books, but also to access the Internet, apply for jobs, learn new skills, and serve as a community public square.⁴

As the Copyright Office (Office) has previously highlighted, “[i]t is because of [their] centrality to the diffusion of knowledge that libraries and archives currently enjoy an exception in the copyright law. Section 108 is a recognition that regular and frequent reproduction and distribution of creative works is vital to the mission of libraries and archives,”⁵ and in many instances should not require the prior authorization of the copyright owner.⁶ As a result, the exception clearly and unequivocally permits certain core activities without requiring consideration of the specific facts of each case or the balancing of multiple factors.⁷

Libraries also enjoy several other specific provisions under copyright law, including Section 109(b) (rental and lease of computer programs and phonorecords), Section 504(c)(2) (reduction of statutory damages in cases of reasonable belief in fair use), Section 602(a)(3)(C) (importation), Section 1201(d) (exemption from circumvention provisions to determine whether to acquire works), Section 1203(c)(5)(B) (remittitur of damages for innocent violations of

and patrons. See Mike Thompson, *Syria's Secret Library*, BBC NEWS (July 28, 2016), <http://www.bbc.com/news/magazine-36893303> [<http://perma.cc/UYM8-XAAL>].

⁴ Steve Haber, *The Changing Role of Libraries in the Digital Age*, HUFFINGTON POST (Jan. 3, 2011), http://www.huffingtonpost.com/steve-haber/the-changing-role-of-libr_b_803722.html [<http://perma.cc/87FK-PDQN>].

⁵ Maria A. Pallante, Commentary, *Section 108 Reform: Session 1: The Legal Landscape*, 36 COLUM. J.L. & ARTS 527, 529 (2013).

⁶ See S. REP. NO. 93-983, at 123 (1974) (noting photocopying's role in the “evolution in the functioning and services of libraries” and the need for Congress to respond to these changes in technology with a statutory exception). See also BORGE VARMER, STUDY NO. 15: PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES (1959), *reprinted in* 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE: STUDIES 14-16, at 49 (Comm. Print 1960) (noting that the “various methods of photocopying have become indispensable to persons engaged in research and scholarship, and to libraries that provide research material in their collections to such persons.”).

⁷ See, e.g., 17 U.S.C. § 108(b) (2016) (copies for preservation, security, or deposit for research in another library or archives); 17 U.S.C. § 108(d) (2016) (copies for users).

section 1201), and Section 1204(b) (exemption from criminal liability for violations of Sections 1201 and 1202).⁸

Despite the law's recognition of the important role of libraries, there remains significant disagreement among some as to whether and to what extent copyright law achieves the right balance between providing access and incentivizing creativity. Part of this disagreement may be attributed to the varied new uses libraries are making of copyrighted works in the digital age, and the complexity of the legal questions that such activities raise.⁹ Part also may reflect the wider—sometimes heated¹⁰—debate in general about the role of copyright in our society and the restrictions it may place on otherwise socially beneficial activity.¹¹

⁸ Of course, libraries also rely heavily on the general exception of fair use (17 U.S.C. § 107). See *infra* text accompanying notes 66–71.

⁹ See, e.g., *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (discussing the HathiTrust Digital Library, a repository of digital copies of books in academic collections); SECTION 108 STUDY GRP., THE SECTION 108 STUDY GROUP REPORT 5–7 (2008), <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> [<http://perma.cc/Y5H7-PMJK>] (hereinafter STUDY GROUP REPORT) (discussing the use of digital technologies by libraries to disseminate materials to users).

¹⁰ See, e.g., Orphan Works and Mass Digitization Roundtable Tr. 118; 12–15 (Mar. 11, 2014) (Mickey Osterreicher, Nat'l Press Photographers Ass'n) ("In terms of addressing some of the [recent fair use] cases, *Plessy v. Ferguson* was the law of the land for a hundred years but that didn't make it right."); *id.* at 105:6–11 (Jan Constantine, Authors Guild) ("[J]ust wait for the next lawsuit that we bring against some of you who are using [fair use] in different ways than what is being used now by the HathiTrust and by Google. You go one page instead of a snippet, we are going after you."); Kevin Smith, *Fair Use, Georgia State, and the Rest of the World*, DUKE U. LIBR. (Dec. 2, 2013), <http://blogs.library.duke.edu/scholcomm/2013/12/02/fair-use-georgia-state-and-the-rest-of-the-world/> [<http://perma.cc/XU9B-PFAW>] (charging that publishers suing over e-reserves are merely bringing attention "to their own greed and mismanagement"). Heated exchanges over copyright law are not a new phenomenon, however. In 1974, then-Register of Copyrights Barbara Ringer noted "the personal anger, the emotion, the presentation of viewpoints in stark black-and-white terms" as characteristics of copyright debates. BARBARA A. RINGER, *THE DEMONOLOGY OF COPYRIGHT* 5 (1974).

¹¹ See generally Kit Walsh, *The Blurred Lines Copyright Verdict is Bad News for Music*, ELEC.FRONTIER FOUND. (Mar. 11, 2015), <https://www.eff.org/deeplinks/2015/03/blurred-line-copyright-verdict-bad-news-music> [<http://perma.cc/6ZT4-ALMT>] ("Copyright law though is dangerously disconnected with the way culture gets made, and as a result it pushes entire genres and communities to the margins . . . Far from being incentivized by copyright, [sampling and remix] authors typically create *in spite of* the threats posed by copyright law."); Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365 (2004) (arguing that certain aspects of recent copyright legislation have ignored the public interest by overemphasizing the property right rationale for copyright).

The complexity of these debates and application of the law to new technologies has led to greater court involvement in recent years. Prior to the 1990s there were very few if any copyright lawsuits against libraries. Although still rare,¹² since then there have been several high profile cases involving library activities, from *Hotaling v. Church of Jesus Christ of Latter-Day Saints*¹³ to *Cambridge University Press v. Patton*,¹⁴ and of course *Authors Guild v. HathiTrust*¹⁵ and *Authors Guild v. Google*.¹⁶

The three most recent cases—all of which involved digital issues to some extent—only highlight the fact that current law fails to clearly address library activities in the digital age, increasing the likelihood of litigation over novel legal issues. As Maria Pallante, Register of Copyrights, testified just last year:

¹² See David R. Hansen, *Copyright Reform Principles for Libraries, Archives, and Other Memory Institutions*, 29 BERKELEY TECH. L.J. 1559, 1572 (2014) (“Since the Copyright Act became effective in 1978, copyright holders have brought only a handful of cases against libraries, with only a small subset approaching the subject matter of section 108.” (citations omitted)).

¹³ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (finding that adding unauthorized copies of a copyrighted work to a library’s collection, listing them in its index or catalog system, and making them available to the public constituted a violation of the copyright owner’s distribution right).

¹⁴ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1283 (11th Cir. 2014) (in the context of a university library’s unlicensed reproduction of work for electronic reserve purposes, remanding to the district court for incorrectly analyzing fair use by treating the factors “mechanistically” and giving them equal weight, rather than using a holistic approach), *remanded to No. 1:08-CV-1425-ODE* (N.D. Ga. Mar. 31, 2016) (finding the large majority of the copying instances to be fair uses based on the analysis the Eleventh Circuit prescribed). This case is currently on appeal again as *Cambridge Univ. Press v. Becker*, No. 16-15726 (11th Cir. *docketed* 2016).

¹⁵ ., *Authors Guild v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014) (finding that mass digitization of more than 20 million in-copyright works for purposes of full-text searching and access for people with print disabilities was fair use). The Second Circuit also ruled that the plaintiffs did not have standing to bring a claim that the defendants’ preservation proposals infringed the plaintiffs’ copyrights. *Id.* at 103-104. Of the cases noted, only the *HathiTrust* case directly analyzed section 108, and in so doing noted that “we do not construe section 108 as foreclosing our analysis of the Libraries’ activities under fair use . . .” *Id.* at 94.

¹⁶ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207, 214–18 (2d Cir. 2015), *cert. denied*, 578 U.S. 15-849, 136 S. Ct. 1658 (2016) (holding that Google’s digitization of copyright-protected works from the collections of several libraries, creation of a search functionality, and display of snippets qualified as fair use).

“In its current state, Section 108 is replete with references to analog works and fails to address the ways in which libraries really function in the digital era, including the copies they must make to properly preserve a work and the manner in which they share or seek to share works with other libraries.”¹⁷

The lack of clear legal guidance for libraries in the digital age is not surprising. Section 108 was enacted initially in 1976 with only minor updates in 1998.¹⁸ Its plain language reflects an analog era with little application to the digital world in which the vast majority of libraries currently operate.¹⁹ For example, Section 108 permits the making of only three copies for preservation but does not address the fact that digital preservation may require more than three copies or that even the making of one digital copy itself may require the creation of a series of interim temporary copies.²⁰ Similarly, subsections 108(d) and (e) permit distribution of a single copy of a portion of a work or of an entire work to a user, but do not explicitly address digital distribution or the multitude of copies that may need to be made along the way to effectuate that provision.²¹ Where Section 108 does explicitly allow digital reproduction—for example, for preservation

¹⁷ *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 20 (2015) (written testimony of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).

¹⁸ See Digital Millennium Copyright Act, Pub. L. No. 105-304, § 404, 112 Stat. 2860, 2890 (1998) (expanding the number of copies and phonorecords permitted from one to three for purposes of preservation and security, deposit for research use in another library or archives, and replacement; and restricting digital copies and phonorecords to the premises of the library or archives).

¹⁹ See *Register’s Perspective on Copyright Review*, *supra* note 17, at 20 (written testimony of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office). See also STUDY GROUP REPORT, *supra* note 9, at 28 (“section 108 is out of date and in many respects unworkable in the digital environment.”).

²⁰ See STUDY GROUP REPORT, *supra* note 9, at 44 (explaining the need for multiple digital preservation copies). Lots of Copies Keep Stuff Safe (LOCKSS) suggests making several copies in an effort to maintain decentralized and distributed preservation over a shared network. *Preservation Principles*, LOCKSS, <https://www.lockss.org/about/principles/> [<http://perma.cc/8CR6-FCXT>].

²¹ See STUDY GROUP REPORT, *supra* note 9, at 101–105 (discussing digital reproduction and delivery for interlibrary loan).

and security copies of unpublished works²² and for replacement copies of published works²³—it forbids any off-premises access to the resultant copies, which is something many libraries see as a critically important component of their preservation mission.²⁴ And Section 108 does not address at all the question of preserving “born-digital” works that reside on the Internet.²⁵

So, essentially, as the Copyright Office has previously acknowledged, we are faced with three options:²⁶

- The first is to leave Section 108 unchanged, which risks that “it will become an increasingly useless appendage to the Copyright Act, a provision of exceptions so narrowly tailored to bygone technology as to be functionally irrelevant”²⁷ for many of today’s digital activities.
- The second is to repeal Section 108 entirely and leave library activities to be conducted under fair use alone, which the Office feels would be unfair to both libraries and to rights holders, all of whom should be able to rely upon concrete, unambiguous exceptions without having to consult a lawyer or risk an infringement suit

²² 17 U.S.C. § 108(b) (2016).

²³ 17 U.S.C. § 108(c) (2016).

²⁴ See STUDY GROUP REPORT, *supra* note 9, at 57–60 (discussing remote access to digital replacement copies), 65–68 (discussing remote access to digital preservation copies). A third provision of section 108 explicitly allowing digital reproduction is subsection 108(h), which allows copies for preservation, scholarship, and research in the last twenty years of a published work’s term of protection. It does not forbid off-premises access.

²⁵ See *id.* at 43 (“[S]ection 108 provisions do not adequately address the preservation of digital materials.”). See also James G. Neal, *Preserving the Born-Digital Record*, AM. LIBR. MAG. (May 28, 2015), <https://americanlibrariesmagazine.org/2015/05/28/preserving-the-born-digital-record/> [<http://perma.cc/FRG2-WSA6>] (noting that current copyright law does not address the preservation of born-digital content).

²⁶ See generally Pallante *supra* note 5, at 529 (setting forth three options for how to address section 108).

²⁷ *Id.* at 529.

every time a library engages in activities that may lie on the edge of current fair use doctrine.²⁸

- The third option, of course, is to revise Section 108 so that it provides a balanced, certain set of exceptions, appropriate to digital technologies, that allows libraries to engage in necessary and reasonable reproduction activities, and to make copies available to users in ways that do not unduly harm the valid interests of rights holders, all while preserving the availability of fair use.²⁹

We think the last option is the best one for libraries, creators, and the public at large.

Of course, it should go without saying that libraries and archives may still avail themselves of fair use where applicable.³⁰ But, it seems that the “safe harbor” of Section 108 remains vitally necessary and should not be allowed to become obsolete by virtue of its age and focus on analog works. Maintaining a provision that fails to meet the needs of all libraries and archives in the digital era may have the perverse result of discouraging socially beneficial preservation and access activities of smaller or more conservative institutions.³¹ Or, alternatively, a library may conclude that fair use covers its activities,

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law, 81 Fed. Reg. 36,594, 36,598 (June 7, 2016) (hereinafter “Notice of Inquiry”) (“[T]here is no reasonable question that the fair use doctrine should or will continue to be available to libraries and archives as an essential provision and planning tool . . .”).

³¹ Cf. KERNOCHAN COMMENTS OF CTR. FOR LAW, MEDIA, & THE ARTS AT COLUMBIA UNIV. SCH. OF LAW, REPLY COMMENTS SUBMITTED PURSUANT TO NOTICE OF INQUIRY ON ORPHAN WORKS AND MASS DIGITIZATION 1–3 (2012), http://www.copyright.gov/orphan/comments/noi_11302012/Columbia-Law-School-Kernochan-Center.pdf [<http://perma.cc/X27J-LS9W>] (arguing, in the context of orphan works, that institutions with legal support from in-house counsel and financial support from private funders can afford to rely on fair use while librarians and archivists “on the ground” would prefer a legislative solution that offers a greater degree of certainty).

only to find out that it will require costly and protracted litigation to obtain a definitive answer.³²

This view was not arrived at in a vacuum or without significant consideration and deliberation. The Copyright Office has studied Section 108 with the aim to update it for more than a decade. Responding in part to librarians and archivists urging change, in 2005 the Copyright Office and the Library of Congress established an independent study group to review and recommend changes to Section 108, particularly with regard to digital technologies.³³ The Section 108 Study Group was composed of library, archives, and copyright experts and stakeholders,³⁴ and after extended public and private deliberation it published its recommendations in 2008.³⁵ The Study Group Report included several unanimous recommendations for substantive changes to Section 108,³⁶ such as including museums;³⁷ adding new eligibility criteria;³⁸ expanding the number of copies allowed to be made for preservation, security, and replacement purposes;³⁹ and allowing outsourcing of excepted activities.⁴⁰ Most

³² See, e.g., *Cambridge Univ. Press v. Becker*, No. 1:08-cv-1425-ODE (N.D. Ga. Aug. 10, 2012) (awarding university defendant in e-reserves infringement case \$2.86 million in attorneys' fees and \$85,746 in costs at the district court level, prior to appeal to Eleventh Circuit); Lee Wilson, *If You Want to Sue for Copyright Infringement*, GRAPHIC ARTISTS GUILD, https://graphicartistsguild.org/tools_resources/if-you-want-to-sue [<http://perma.cc/PWP3-X4G8>] (describing the time and costs—"several thousand dollars" for "even a relatively uncomplicated suit"—related to litigation); Adam Liptak & Alexandra Alter, *Challenge to Google Books is Declined by Supreme Court*, N.Y. TIMES (Apr. 18, 2016), http://www.nytimes.com/2016/04/19/technology/google-books-case.html?_r=0 [<http://perma.cc/B75T-E83C>] (discussing the long history of the Google Books case).

³³ The National Digital Information Infrastructure and Preservation Program (NDIIPP) of the Library of Congress, in cooperation with the U.S. Copyright Office, convened the section 108 Study Group.

³⁴ See *Members of the section 108 Study Group*, SECTION 108 STUDY GROUP, <http://www.section108.gov/members.html> [<http://perma.cc/ZKL9-JF8G>].

³⁵ STUDY GROUP REPORT, *supra* note 9, at 4–5.

³⁶ The Study Group also identified topics ripe for legislation but that did not have a consensus recommendation. These included amending section 108 to allow for digital interlibrary loan and to allow libraries and archives to copy musical works, pictorial, graphic or sculptural works, and audiovisual works that are otherwise excluded by subsection 108(i). *Id.* at 95–112.

³⁷ *Id.* at 31.

³⁸ *Id.* at 34.

significantly, the Study Group recommended that Section 108 allow up-front preservation copying of certain published works,⁴¹ and add a new provision allowing the reproduction and preservation of publicly available Internet content.⁴²

After the Copyright Office reviewed and analyzed the Study Group Report, it re-convened the Group's members in 2012. The members at this meeting agreed that revising Section 108 remained important, and that those issues on which the Study Group did not reach unanimous consent still had to be addressed. The Copyright Office considered additional issues as well, such as the increasing reliance upon fair use by libraries and archives, and the potential need to tailor the exceptions to each different type of institution that uses them. The following year, the Copyright Office co-sponsored a symposium at Columbia Law School on revision of Section 108.⁴³ The panelists there discussed topics such as accessibility of preservation copies,⁴⁴ Section 108's application to mass digitization,⁴⁵ and security of digitized works.⁴⁶

More recently, in 2014 the House Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on "Preservation and Reuse of Copyrighted Works," where the topic of Section 108

³⁹ *Id.* at 52, 61, 64.

⁴⁰ *Id.* at 39.

⁴¹ *Id.* at 69–79.

⁴² *Id.* at 80–87.

⁴³ See Pallante, *supra* note 5. For the program and videos of the program, see *section 108 Reform*, KERNOCHAN CTR. FOR L., MEDIA, & THE ARTS, <http://web.law.columbia.edu/kernochan/symposia/section-108-reform> [<http://perma.cc/7Z2H-4KQF>].

⁴⁴ *Section 108 Reform: Session 4: What Should Be the Conditions on Libraries Digitizing, Maintaining and Making Available Copyrighted Works?*, 36 COLUM. J.L. & ARTS 587, 598 (2013).

⁴⁵ *Section 108 Reform: Session 3: To What Extent Should Libraries Be Permitted to Engage in Mass Digitization of Published Works, and for What Purposes?*, 36 COLUM. J.L. & ARTS 567 (2013).

⁴⁶ *Section 108 Reform: Session 4: What Should Be the Conditions on Libraries Digitizing, Maintaining and Making Available Copyrighted Works?*, *supra* note 44.

revision was discussed at length.⁴⁷ At the hearing, a librarian-member of the Section 108 Study Group argued that a combination of fair use and the current Section 108 was all that libraries needed in order to pursue their missions.⁴⁸ However, the co-chair of the Study Group, a former publishing attorney, maintained that revision of Section 108 remained necessary.⁴⁹ This opinion was shared by the Chief of the Library of Congress's Packard Campus for Audio Visual Conservation, who testified that the preservation of audiovisual works, in particular, would benefit from an updated Section 108.⁵⁰ As to the relationship between fair use and Section 108, the Chairman of the House Judiciary Committee remarked:

[I]t is probably true that there are clear-cut cases in which fair use would apply to preservation activities, [but] fair use is not always easy to determine, even to those with large legal budgets. Those with smaller legal budgets or a simple desire to focus their limited resources on preservation may prefer to have better statutory guidance than exists today.⁵¹

Finally, in 2015, the Register of Copyrights testified that the Copyright Office was preparing a legislative recommendation that would address, among other topics, "museums, preservation

⁴⁷ See PRESERVATION AND REUSE OF COPYRIGHTED WORKS: HEARING BEFORE THE SUBCOMM. ON COURTS, INTELLECTUAL PROP., AND THE INTERNET OF THE H. COMM. ON THE JUDICIARY, 113TH CONG. (2014), <https://judiciary.house.gov/wp-content/uploads/2016/02/113-88-87423.pdf> [<http://perma.cc/RL2X-WY3C>].

⁴⁸ *Id.* at 32 (testimony of James G. Neal, Vice President for Information Services and University Librarian, Columbia University) ("[T]he existing statutory framework, which combines the specific library exceptions in section 108 with the flexible fair use right, works well for libraries and does not require amendment.").

⁴⁹ *Id.* at 27, 30 (statement of Richard S. Rudick, Co-Chair, section 108 Study Group) ("[section 108] is so outdated and inadequate as to no longer serve its function...").

⁵⁰ *Id.* at 15–18 (statement of Gregory Lukow, Chief of Packard Campus for Audio Visual Conservation, Library of Congress) (suggesting that Congress "[r]evis[e] subsections 108(b) and (c), which govern the reproduction of unpublished and published works, to allow for the use of current technology and best practices in the preservation of film, video, and sound recordings" (emphasis omitted)).

⁵¹ *Id.* at 6 (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary).

exceptions and the importance of ‘web harvesting’ activities.”⁵² This recommendation, explained the Register would completely overhaul the “needlessly convoluted” organization of Section 108 so that its provisions would be “comprehensible and...relate[d] logically to one another.”⁵³

I. WHAT DOES THE U.S. COPYRIGHT OFFICE PROPOSE TO DO?

On the heels of the Register’s announcement, the Copyright Office is currently preparing recommendations and conclusions for revising Section 108 to make it more understandable and easier to use. The Copyright Office intends to propose that Congress retain the majority of the current provisions, including the fair use savings clause, and merge them with several new provisions in a clear and straightforward manner.⁵⁴

Many of the new provisions expected to be included in the Copyright Office’s proposal are inspired by the Study Group’s recommendations. Other new provisions reflect the Office’s further work and symposia discussions.

In early June of 2016, the Copyright Office announced a series of meetings that would provide the opportunity for it to receive input on several remaining open questions as the Office finalizes its recommendation.⁵⁵ Over the course of the summer of 2016, the Office held almost forty meetings with individuals representing a wide range of libraries, archives, creators, owners, and other experts. These meetings provided helpful information as the Office considered its final recommendation to Congress.

One question that many may ask is whether the timing is right for a revision of Section 108. Some argue that Section 108, supplemented by fair use (Section 107), is working well for most libraries, so why risk

⁵² *Register’s Perspective on Copyright Review*, *supra* note 17, at 21 (written testimony of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).

⁵³ *Id.*

⁵⁴ See Notice of Inquiry, *supra* note 30, at 36,598 (discussing Copyright Office proposals for revision of section 108).

⁵⁵ See *id.* at 36, 598–99 (listing topics for planned Copyright Office section 108 revision meetings).

upsetting the balance at this time?⁵⁶ The Office's Section 108 review, however, cannot be considered in isolation. It is being conducted in conjunction with Congress's multi-year review of every aspect of the copyright law.⁵⁷ As Chairman Goodlatte noted in beginning the process, "[t]here is little doubt that our copyright system faces new challenges today...a wide review of our nation's copyright laws and related enforcement mechanisms is timely."⁵⁸ Such a comprehensive review, designed to determine whether copyright law is up to date, occurs less than twice per century; the last comprehensive revision of the statute as a whole was enacted in 1976,⁵⁹ and the revision prior to that was in 1909.⁶⁰ Viewed in this context, it is not remarkable that Section 108 reform is taking place now—rather, it would be remarkable for Section 108 to be excluded from this important process.

II. INTERNATIONAL ISSUES

Of course, the United States is not alone in reviewing the issue of copyright exceptions for libraries. Copyright is global and libraries themselves have global networks. The World Intellectual Property Organization (WIPO) has been studying the possibility of some type of treaty for library exceptions for many years.⁶¹ While the U.S. position

⁵⁶ See, e.g., LIBR. COPYRIGHT ALL., STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE ON THE COPYRIGHT OFFICE'S NOTICE OF INQUIRY CONCERNING SECTION 108 OF THE COPYRIGHT ACT (2016), <http://www.arl.org/storage/documents/publications/108noiposition2.pdf> [<http://perma.cc/45T9-GH6E>] ("[F]air use supplements section 108 and thus provides a sufficient mechanism for updating it when necessary.").

⁵⁷ Cf. Press Release, House of Representatives Judiciary Committee, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), <https://judiciary.house.gov/press-release/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw/> [<http://perma.cc/V97P-L3GN>].

⁵⁸ *Id.*

⁵⁹ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁶⁰ See An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

⁶¹ See WIPO Standing Comm. on Copyright & Related Rights, *The Case for a Treaty on Exceptions and Limitations for Libraries and Archives: Background Paper by IFLA, ICA, eIFL and INNOVARTE*, WIPO Doc. SCCR/23/3, at 4 (Nov. 18, 2011).

has been to favor a soft law approach, such as objectives and principles to assist in the development of individual domestic exceptions, the bottom line is that we all agree that specific exceptions are important in this area.

As of mid-2015, 156 countries have at least one statutory library exception, of which ninety-nine have a preservation exception,⁶² and several jurisdictions have recently been considering updates and amendments including Australia⁶³ and the European Union.⁶⁴

III. FAIR USE

In a perfect world, library exceptions would be regularly updated for the benefit of both users and owners. The question of whether to update would be easy, and the focus would be on how to update to maintain the appropriate balance in the law.⁶⁵ Today, however, answering the former question appears as difficult as the latter. Even the beneficiaries of a specific exception often question the value of updating the law, concerned that to do so might somehow undermine the flexibility of fair use and upend established practices.⁶⁶ We think it is worth emphasizing that fair use and specific exceptions can and should easily co-exist.⁶⁷ Congress drafted the Copyright Act of 1976

⁶² See Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*, WIPO Doc. SCCR/30/3, at 6, 10 (June 10, 2015).

⁶³ *Civil Law and Justice Legislation Amendment Act 2014* (Cth) sch 7(5) (Austl.) (inserting new section 195CC into the Copyright Act 1968).

⁶⁴ European Commission Fact Sheet MEMO/15/6262, Making EU Copyright Rules Fit for the Digital Age—Questions & Answers (Dec. 9, 2015), http://europa.eu/rapid/press-release_MEMO-15-6262_en.htm [<http://perma.cc/8G72-Y86Q>].

⁶⁵ Cf. Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1209 (2010) (“Maintaining a balance between a copyright owner’s exclusive rights and the public’s right to use such works free from copyright owner control is critical for a well-designed copyright law.”).

⁶⁶ LIBR. COPYRIGHT ALL., *supra* note 56 (“[A]mending section 108 could have the effect of limiting what libraries do today.”).

⁶⁷ See *Register’s Perspective on Copyright Review*, *supra* note 17, at 15 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (“section 108 has always had a savings clause for fair use, ensuring that both would be available as appropriate to the libraries and courts that must apply them.”).

with that balance firmly in mind,⁶⁸ and no court in the United States has ever suggested otherwise.⁶⁹

Resolution of the legal issues facing libraries in the digital age should not require repeated, and expensive, court action. Certainly, other voluntary initiatives such as best practices documents may be helpful to a point.⁷⁰ But, if these practices are trying to fill in known gaps in the law, why not just fix the law?

The critical role of libraries in preserving knowledge is the reason Congress adopted specific exceptions in our copyright law to cover their activities. This is no less important in the digital age. We should continue to respect that role with specific, effective, and understandable exceptions that actually apply in today's environment.

⁶⁸ See 17 U.S.C. § 108(f)(4); H.R. REP. NO. 94-1476, at 78 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693 (“[I]t is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works.”).

⁶⁹ See *Authors Guild v. HathiTrust*, 755 F.3d 87, 94 n.4 (2d Cir. 2014) (“[W]e do not construe § 108 as foreclosing our analysis of the Libraries’ activities under fair use, and we proceed with that analysis.”).

⁷⁰ Cf. UNITED STATES COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 45 (2015) (“[F]air use best practices often are arrived at absent consultation with authors and other copyright owners, and therefore they run the risk of being more of an aspirational document—what a community believes fair use *ought* to be—than a descriptive one.”).